NO. 45507-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL R. GRADT,

Appellant.

BRIEF OF RESPONDENT

Mark McClain
Prosecuting Attorney
Pacific County, Washington

Office Address:

300 Memorial Avenue
PO Box 45
South Bend, WA 98586

Telephone: (360) 875-9361

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I.

STATE'S RESPONSE TO THE APPELLANT'S ASSIGNMENTS OF ERROR

The State accepts the Appellant's designation of the decision being appealed.

II.

STATE'S RESPONSE TO THE APPELLANT'S ISSUES PRESENTED FOR REVIEW

The State accepts the Appellant's designation of the issues presented for review.

III.

STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case.

IV.

ARGUMENT

The Pacific County Superior Court did not err in holding the general savings clause of RCW 10.01.040 applies to Washington State Initiative I-502.

A. Standard of Review

Rules for Appeal of Decisions of Court of Limited Jurisdiction (RALJ) 9.1(a) and (b) govern the review of a district court's decision, whether by an appellate court or by a superior court. State v. McLean, 178.Wn. App. 236, 313 P.3d 1181 (2013). In reviewing the district court's decision, the appellate court reviews factual determinations for substantial evidence and reviews conclusions of law de novo. McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012). The standard of review for matters of statutory interpretation is de novo. State v. J.P., 149 Wn.2d 444, 449, 69P.3d 318 (2003).

B. Issue 1: Does the general savings clause of RCW 10.01.040 apply to Washington Initiative I-502?

The Washington State legislature has enacted a general savings clause that reads as follows:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and

> every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040, emphasis added. It is well settled that "[the]...savings clause is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute." State v. Ross, 152 Wn.2d 220, 237, 95 P.3d 1225 (2004), quoting State v. Hanlen, 193 Wn. 494, 497, 76 P.2d 316 (1938). This savings statute requires defendants to be prosecuted under the law in effect at the time that the crime was committed. State v. Calhoun, 163 Wn. App. 153, 257 P. 3d 693 (2011). In the absence of a contrary expression from the legislature (or in this case from Initiative 502), all crimes are to be prosecuted under the law existing at the time of the commission of the crime. State v. Kane, 101 Wn. App. 607, 5 P. 3d 741 (2000); State v. Hylton, 154 Wn. App 945, 226 P. 3d 246 (2010).

The Appellant claims that possession of small amounts of marijuana was decriminalized by initiative of the people and not an act of the legislature, therefore, the general savings clause of RCW 10.01.040

cannot apply. Br. of Appellant at 3. In support of this argument the Appellant cites to United States v. Chambers, 291 U.S. 217, 54 S.Ct. 424, (1934).

In, Chambers, the United States Supreme Court was responding to the prosecution of two individuals, Clause Chambers and Byrum Gibson, for "conspiring to violate the National Prohibition Act, and for possessing and transporting intoxicating liquor contrary to that act..." Chambers, 291 U.S. at 221. The indictments of Chambers and Gibson were filed on June 5, 1933. Id. The Twenty-First Amendment of the Constitution of the United States was ratified on December 5, 1933, which rendered the Eighteenth Amendment and the provisions of the National Prohibition Act which relied on it inoperative. Id. at 222. Both Chambers and Gibson, whose cases were in varying stages of prosecution at this time, moved for dismissal of their indictments. Id. Their motions were granted by the District Court for the Middle District of North Carolina. Id.

The Government appealed citing the general saving provision enacted by Congress. Id. at 223. This federal savings clause stated that "penalties and liabilities theretofore incurred are not to be extinguished by the repeal of a statute 'unless the repealing Act shall so expressly provide,' and to support prosecution in such cases the statute is to be treated as

remaining in force." Chambers, 291 U.S. at 224, quoting Rev. St. § 13(1 U.S.C. § 29 (1USCA §29)).

The United States Supreme Court denied this argument and held that once the Eighteenth Amendment was repealed, Congress had no competent authority to "save" and keep alive ongoing prosecutions under the National Prohibition Act. Chambers, 291 U.S. at 223. This decision is based on the principal that Congress is powerless to expand or extend its constitutional authority. Id. at 224. In our parallel governing system of state and federal government, "the National Government possesses only limited powers; the States and the people retain the remainder." Bond v. U.S., 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014).

The State is imbued with broad inherent power and authority to enact legislation for the public good. United States v. Lopez, 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed. 2d. 626 (1995). This power is commonly referred to as the "police power." Id. There is no analogous authority at the federal level as the federal government is acknowledged by all to be only one of enumerated powers, and as such "can exercise only the powers granted to it." Bond, 134 S.Ct. at 2086, quoting McCulloch v. Maryland, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). The federal government derives its authority solely from the United States Constitution and is not empowered to perform all the conceivable

functions of government. National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566, 2577, 183 L.Ed.2d 450 (2012).

The People granted the federal government the authority to prosecute violators such as Chambers and Gibson when the Eighteenth Amendment was ratified. Chambers, 291 U.S. at 222. However, the People removed this power through the Twenty-First Amendment. Id. The effect of this repeal was not only to repeal legislation but also to remove the grant of authority previously bestowed to the federal government. Id. at 225. As a result, Congress could not point to any "competent authority" for its savings clause to operate under and "save" the necessary portions of the National Prohibition Act to continue the Government's prosecutions. See Id.

This ruling, and the reasoning behind it, simply does not apply to the current case. The State of Washington does not stand in the same shoes as the Federal Government in Chambers. The State did not need a special grant of authority by the people, constitutional or otherwise, to pass laws delineating and punishing criminal behavior. The State of Washington has the inherent power to do so under, its "police power." By removing criminal penalties for adult possession of limited amounts of marijuana, I-502 effectively repealed statues or portions of statutes that led to the prosecution of Mr. Gradt. However, it did not, and could not

remove the authority of the State by which it enacted the legislation. This police power exists, even as the statute itself may not, and therefore the State can point to "competent authority" under which its savings clause may still act and extend prosecutions for violations that occurred before the repeal.

C. Issue 2: Does Initiative I-502 fairly convey an intention that it should be applied retroactively?

When approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute. American Legion Post #149 v. Washington State Dept. of Health, 164 Wn.2d 570, 192 P.3d 306 (2008). In determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure. Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762 (2000). Basic rules of statutory construction applicable to legislative enactments also apply to direct legislation by the people in form of an initiative. Seeber v. Washington State Public Disclosure Commission, 96 Wn.2d 135, 634 P.2d 303 (1981).

An intent to make a law retroactive does not have to be "expressly declared," but the enactment must contain "words that fairly convey that intention." State v. Grant, 89 Wash. 2d 678, 683, 575 P. 2d 210 (1978).

The Appellant points to Section 1 of Initiative 502 in claiming that it contains language that requires retroactive application. Appellant's Brief at 5. A fair reading of the language of Section 1 under the heading of "Intent" does not support the Appellant's position. This section lists three reasons for its adoption:

(1) Allows law enforcement resources to be focused on violent and property crimes;

(2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and

(3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.

Wash. Sec'y of State, Elections Div., Initiative Measure No. 502, I2465.1/11(2011).

Of the above reasons, clearly the latter two are served in no way by applying the initiative retroactively. First, the generation of tax revenue is

a forward looking benefit anticipated only once the state-run licensing system is put in place. Secondly, by obtaining his marijuana before the this system was operating, Mr. Gradt, and other similar actors, were fueling and supporting the illegal drug organizations that this initiative was aimed at putting out of business.

The only intent that is even partially served by retroactive application of the initiative is the focusing of law enforcement resources on other crimes, but this goal is only partially served. Those being prosecuted before the passage of the initiative would have already caused the expenditure of these resources to a large extent, any savings come only from the lack of continued prosecution costs.

None of this prefatory language even remotely implies that the provisions of Initiative 502 were meant to apply retroactively. On the contrary, Section 1 of Initiative 502 states that the people want to try "a new approach." This language implies that the Initiative was forward looking and was meant to apply prospectively. In this vein, the voters' pamphlet for Initiative 502 lists the effective date as December 6, 2012. See Pierce County v. State, 150 Wash, 2d 422, 430, 78 P. 3d 640 (2003) (voters' pamphlet can be consulted to determine intent when an initiative is ambiguous).

In short, Initiative 502 creates a new regulatory scheme for marijuana production, processing, and sales, but the language of the I-502 does not fairly convey that it applies to activities before the effective date of the Initiative.

The Appellant cites State v. Zornes, 78 Wash. 2d 9, 475 P. 2d 109 (1970), and State v. Grant, 89 Wash. 2d 78, 575 P. 2d 210 (1978) for the proposition that the savings statute contained in RCW 10.01.040 should not be applied in this case. The relevant statutory language in Zornes was deemed to be retroactive because it stated that "the provisions of this chapter shall not ever be applicable to any form of cannabis." 78 Wash. 2d at 11. The words "not ever" evince a clear intention to apply the new statutory language retroactively. Because there is no similar verbiage in Initiative 502, the decision in Zornes is not relevant to the present case, since the statutory language in question is so different.

Lastly, State v. Grant dealt with new statutory language which stated that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." 89 Wn.2d at 684. This language constitutes a blanket declarative statement that is qualitatively different form the equivocal statements contained in Initiative 502. Therefore, Grant does not support the position advocated by the Appellant.

In the end, the language of Initiative 502 does not contain definitive statements that fairly convey an intention to apply the new provisions retroactively. In addition the stated purposes of the initiative will not be served by retroactive application. It did not proscribe a complete ban on prosecutions for possession of marijuana, but only allowed for certain types of possession: possession of small amounts, less than an ounce, for personal use, or possession of larger amounts pursuant to the rules of the state-regulated business of manufacturing, transporting, and selling of it. The motivation of the people was mainly economic; providing a new revenue stream and reduce expenditure of resources, with the additional goal of taking revenue away from drug dealers. Applying I-502 retroactively does not serve these purposes.

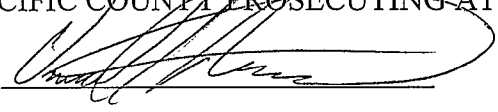
V.

CONCLUSION

For the foregoing reasons discussed above, the Court of Appeals should affirm the RALJ decision of the Pacific County Superior Court and uphold Mr. Gradt's conviction.

Respectfully submitted this 16th day of March, 2015.

MARK MCCLAIN
PACIFIC COUNTY PROSECUTING ATTORNEY

By: 

Donald J. Richter, WSBA # 39439
Pacific County Prosecuting Attorney
P.O. Box 45
South Bend, WA 98586

PACIFIC COUNTY PROSECUTOR

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